92-2057

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

BRENDA RABBITT

Petitioner,

vs.

STATE OF CALIFORNIA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff should be deprived of her due process rights by a governmental entity asserting an immunity theory which is barred due to willful misconduct by the public entity?

2. Whether in an action where a state breaches its lease agreement with the Federal Government to maintain structures on the land, is the state immune from liability when they knowingly and negligently fail to maintain a fence and signs erected to guard against a known dangerous condition which results in injury depriving a plaintiff of Due Process?

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Petitioner Brenda Rabbitt (hereinafter "Ms. Rabbitt") respectfully prays that a writ of certiorari issue to the judgment and opinion of the Supreme Court of the State of California entered in the above entitled proceeding on November 10, 1992.

OPINIONS BELOW

On November 10, 1992, the Supreme Court of the State of California, issued an order denying Petitioner's petition for review of the decision of the Court of Appeal of the State of California, Third Appellate District. A copy of this order is attached as Appendix A.

The Court of Appeal of the State of California, Third Appellate District, issued a decision and opinion on July 27, 1992 affirming a summary judgment of the Sacramento County Superior Court, dismissing Petitioner's complaint entered

on July 16, 1986. A copy of this decision is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28 United States Code, Section 1254(1). The judgment of the Supreme Court was entered November 10, 1992. A timely Petition for Writ of Certiorari was filed on February 10, 1993 and returned by the clerk of the Court for failure to comply with the Rules of the Court. A second Petition was filed on April 19, 1993 and again returned for failure to comply with the Rules of the Court. This third filing follows the Clerks request for a corrected Petition by letter dated May 5, 1993.

STATUTES INVOLVED

The Fourteenth Amendment to the federal Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

This case involves immunity from liability for injuries caused by a natural condition of unimproved property under Government Code section 831.2 which provides in part:

> "(a) Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved property."
>
> "(b) The absolute nature of the immunity provided by section 831.2 precludes the imposition on a public entity of a duty to warn of dangerous natural conditions on unimproved property."

This case also involves Section 846 of the California Civil Code which provides in relevant part:

"An owner of any estate or any other

interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided as follows:

"(a) Section 846 does not limit liability which otherwise exists for willful or malicious failure to guard or warn against a dangerous condition, use structure or activity."

"(b) Three elements must be present to raise a negligent act to willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is probable, as opposed to probable, result of the danger, and (3) conscious failure to act to avoid the peril.

STATEMENT OF THE CASE

In this action, Ms. Rabbitt alleges that the State of California negligently failed to maintain a barrier fence erected above the cliffs in the park area of Negro Bar State Park. She further asserts that warning signs that were attached to the fence were inadequately placed and maintained. The land in question is owned by the Federal Government and leased to the State of California. Ms. Rabbitt alleges that due to the negligent maintenance of the fence and inadequate maintenance and placement of the warning signs, despite the State's knowledge that both were repeatedly in need of repair, she walked through a 10 foot missing section and fell from the 80 foot high cliff. The State of California asserts that it is not liable for any negligence due to their immunity from liability under

Government Code § 831.2

On November 10, 1992, the Supreme Court denied review of the Third Appellate Courts decision which granted summary judgment to the State finding that the State of California was immune from liability due to Petitioner's non-reliance on the defective fencing and inadequately placed and maintained warning signs. The following is a summary of facts and evidence leading up to the present petition.

During the early hours of March 1, 1986, Ms. Rabbitt, accompanied by 5 of her friends drove up to the Orangevale Bluffs, "a steep cliff area" located on federally leased land above Lake Natoma. This night was very dark and foggy. The purpose of the visit to this particular area was to view a cave which is located just below the cliff. The State had voluntarily

erected a "six foot high safety barrier chain link fence" as well as placing several warning signs. Both the fence and warning signs were in a constant state of disrepair due to vandalism. The fence and warning signs were intended to prevent people from wandering off the edge of the cliff as well as warning of a dangerous area. Two of Ms. Rabbitt's companions knew of the fence, cave and warnings signs, but Ms. Rabbitt along with her other three companions did not. The group walked toward the cliff and through a 10 foot missing portion of the fence. Since the area beyond the fence was very bushy the drop of of the cliff was virtually invisible. When Ms. Rabbitt went to sit down, she fell off the 80 to 100 foot cliff, suffering catastrophic injuries.

The Court ruled that it did not make any difference whether the fence or

warning were defective or improperly maintained, because they were located on unimproved land used for recreational purposes; therefore the State had absolute immunity from liability under Government Code § 831.2. Appeal is then entered into the Third Appellate District.

REASON FOR GRANTING WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL ON AN IMPORTANT ISSUE AFFECTING ALL CASES INVOLVING INJURIES SUSTAINED ON PUBLIC UNIMPROVED LAND WHERE IMMUNITY FROM LIABILITY IS IMPROPERLY INVOKED WHICH DEPRIVES AN INJURED PARTY DUE PROCESS UNDER THE U.S. CONSTITUTION.

THE DECISION BELOW MISPLACES THE IMMUNITY LAW AFFORDED LAND OWNERS AND PUBLIC ENTITIES. THE RULING IN FAVOR OF THE STATE'S MOTION FOR SUMMARY JUDGMENT DUE TO MS. RABBIT'S NON-RELIANCE ON A NEGLIGENTLY MAINTAINED BARRIER FENCE AS WELL AS INADEQUATELY PLACED AND POORLY MAINTAINED WARNING SIGNS UNDERMINES THE ENTIRE CONCEPT OF THE IMMUNITY LAW AND

CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL.

In this case, the Third District held that even if a barrier fence admittedly negligently maintained by a public entity, as well as inadequately placed and poorly maintained warning signs erected on a known dangerous cliff area frequented by the public, the owner or possessor of the land has no duty to maintain the fence barrier or warning signs even if their negligence is responsible for injuries resulting from their negligence. The Third District held that in order to prevail, Ms. Rabbit would have had to rely on the barrier fence and the warning signs, and under Government Code 831.2 the State is immune from liability. In other words, even though the State of California was aware of the dangerous condition, admitted that the barrier fence was in a

constant state of disrepair, and warning signs were inadequately placed and negligently maintained, they had no duty to anyone suffering from injuries as a result of their non-action if the injured party did not rely on the barrier or warning signs. The Appellate Court relied on McCauley v. City of San Diego, 190 Cal. App. 3d 981, which in part states an undisguised cliff openly dangerous to all, with fog and darkness is of no consequence. According to McCauley, in order for Ms. Rabbitt to overcome the absolute immunity afforded in this case, the public entity must have increased the dangerousness of the cliff from which she fell and/or the public entity's conduct must have induced her reliance. The effect of the Third District's ruling severely abuses use of the "Immunity Law", which has been used to cloak the State's

negligent actions regarding proper maintenance of a barrier fence and warning signs erected for the purpose of deterring the public from falling prey to a known dangerous condition. The State was aware of previous accidents in this same location under similar circumstances, but still only made feeble efforts to adequately protect the users of the land. The Third District's ruling in the instant case conflicts with the holding of Von Tagen v. United States, 557 F. Supp. 256 (1983) in that knowledge of a dangerous condition and failing to adequately warn or protect the public during recreational use constitutes willful or wanton misconduct. Willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of

the possible results.

New v. Consolidated Rock Products, Co., 171 Cal. App. 3d 681 (1985) gives rise to three essential elements which must be present to raise a negligent act to the level of willful misconduct; (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is probable, as opposed to possible, result of the danger, and (3) conscious failure to act to avoid the peril.

In the instant case, the Third District did not apply California Civil Code § 845 which clearly outlines exceptions to the immunity law governing recreational use of property. Nor was evidence relating to the degree of negligence permitted to be reviewed by the Court, thereby depriving Ms. Rabbitt of "Due Process" under the Constitution of

the United States.

The area in the instant case is owned by the Federal Government but leased to the State of California. Among other provisions, the lease agreement provides that the State of California shall be responsible for maintenance of the land including any structures. The barrier fence along with the warning signs were negligently maintained some time prior to Ms. Rabbitt's accident, up until the accident, and several months subsequent to the accident. This constituted a material breach of their lease agreement. Had these structures been maintained properly, it is probable that this or any accident similar to this nature would have taken place. Hiding under the mask of Government Code § 831.2, and not applying California Code § 845 has deprived Ms. Rabbitt of "Due Process".

CONCLUSION

This case presents important questions regarding depriving a plaintiff of "Due Process" due to a public entities' immunity from liability, even if injuries are sustained as a result of inadequate and feeble attempts to guard or warn against a known dangerous condition. These questions have been answered differently by various Courts of Appeal with differing results. Therefore, the petition for a Writ of certiorari should be granted.

Respectfully submitted,

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Dated: June ___, 1993

THIRD APPELLATE DISTRICT No. C009397
S028360

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

BRENDA RABBITT, Etc., Appellant

v.

STATE OF CALIFORNIA, Respondent

Appellant's petition for review DENIED. The request for an order directing publication of the opinion is denied.

F. GEORGE

Acting Chief Justice

IN THE COURT OF APPEAL OF

CALIFORNIA

IN AND FOR THE THIRD DISTRICT

(Sacramento)

BRENDA RABBITT, etc.,	3 Civ. C009397
Plaintiff and Appellant,	(Super.Ct. No. 341615)
v.	
STATE OF CALIFORNIA,	
Defendant and Respondent.	

Plaintiff Brenda Rabbitt suffered catastrophic injuries when she fell from a bluff above the American River Canyon. On a foggy night plaintiff walked through a gap in a chain link fence in the state park above the canyon. Plaintiff's guardian ad litem filed a persona injury action against the State of California ("State") alleging the property was in a dangerous and defective condition because of the vandalized fence. The court

granted summary judgment in favor of the state, finding the state immune from liability under Government Code section 831.2, which provides: "Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach.[1]

On appeal, plaintiff argues the state, by erecting the fence, voluntarily undertook to protect the public, and therefore section 831.2 does not apply. Plaintiff also contends the evidence raises a question of fact as to whether the bluff was "unimproved property" within the meaning of section 831.2, and whether the state is liable under Government Code

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[1] All statutory references are to the Government Code unless otherwise indicated.

section 835, which imposes liability for a dangerous condition. Finding no error, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The accident occurred on the Orangevale Bluffs, a steep cliff above the American River Canyon and Lake Natoma. In 1978 the state constructed a six foot high, chain link fence running one mile along the bluffs. In addition to erecting the fence, the state posted signs "warning of the hazards associated with the cliff which were attached to the fence at various locations.[2] The warning signs read "Danger", "Stay Back" and "Steep Bank."

The fence and signs were designed to deter the public from wandering too close

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[2] The state also attempted to fill the opening of the nearby cave with a concrete plug.

to the edge of the cliff. The fence frequently needed repair from vandalism and was in need of repair for some time prior to plaintiff's accident.

Just after midnight on a dark, foggy, March morning in 1986 plaintiff and several companions walked along the Orangevale Bluffs.[3] Two of plaintiff's companions knew of the cliff, the fence and a nearby cave, but plaintiff was unaware of the fence or the warning signs. Plaintiff walked toward the cliff, unaware of the fence, and walked through a 10-foot missing section of fence. The area beyond the fence was covered with brush; the cliff edge could not be seen. After passing through the fence plaintiff walked 40 to 50 feet form the mission section,

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[3] There was some evidence plaintiff consumed "a little" whiskey earlier that day.

attempted to sit down, and fell of the 100-foot cliff.

Plaintiff, who was 24 at the time of the accident, has no recollection of the accident. Plaintiff's companions state they did not see the fence on the night of the accident. Plaintiff testified she was unaware of the fence prior to the accident.

Plaintiff's injuries were truly tragic, and included permanent brain damage and orthopedic injuries. Plaintiff's guardian at litem filed a complaint alleging the state negligently maintained the fence on the bluffs, creating a dangerous, hazardous condition which caused plaintiff's accident. The state answered the complaint, and raised various affirmative defenses, including immunity under section 831.2.

Both parties filed motions for

summary judgment. The state moved for summary judgment, arguing it was immune from liability for injuries caused by the natural condition of unimproved property under section 831.2.

The trial court granted the State's motion finding: "The condition [of the accident site] is natural. The fence did not change this. The State could have assumed a duty by construction and maintenance of the fence. However, under McCauley v. City of San Diego (1987) 190 Cal App 3d 981, 985, for the state to have assumed such a duty, the plaintiff must have seem and relied on the fence in order to hold the state liable. Rombalski v. City of Laguna Beach 91989) 213 Cal app 3d 842, 853, it is undisputed that the plaintiff did neither." Plaintiff's motion was denied as moot. Following entry of judgment, plaintiff filed a

timely notice of appeal.

DISCUSSION

I. Standard of Review

The purpose of summary judgment procedure is to discover, through appropriate supporting and opposing papers, whether the parties possess evidence requiring the weighing procedures of a trial. The rules are well known. A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

Although the issues are framed by the pleadings, the motion must be decided upon admissible evidence in the form of affidavits, declarations, admissions, answers to interrogatories, depositions,

and matters subject to judicial notice. (AARTS Production, Inc. v. Crocker National Bank (1986) 179 Cal App 3d 1061, 1064; Code Civ. Proc., § 437c, subd. (d).) A defendant moving for summary judgment has the burden of establishing that the action is without merit; a factual showing negating all causes of action upon all theories is required. (Tresemer v. Barke (1978) 86 Cal App 3d 656, 666.)

Summary judgment raises only questions of law, which are reviewed independently. Our review tracks the same, three-step process used by the trial court: First, we identify the issues framed by the pleadings. Second, we determine whether the moving party has established facts sufficient to negate the opponent's claim. Third, if that burden is met, we examine whether the opposing party's showing discloses that triable

issues of material fact exist. (AARTS Productions, Inc. V. Crocker National Bank, supra, 179 Cal App 3d 1061, 1064-1065.)

II. Immunity Under Section 831.2

Section 831.2 codifies an absolute immunity for public entities and their employees for injuries caused by natural conditions of any unimproved public property. The provision was enacted to relieve public entities of the burden and expense of putting natural unimproved property in a safe condition and defending claims for injuries flowing from its use, thus guaranteeing public access and use of such unimproved, publicly held property. (Milligan v. City of Laguna Beach (1983) 34 Cal 3d 829, 832-834.) Section 831.2 is designed to address the problem of limited availability of recreational facilities where the public demand is greater than

the finite supply of such natural recreational resources. (Keyes v. Santa Clara Valley Water Dist. (1982) 128 Cal App 3d 882, 889.)

For immunity under section 831.2 to attach, the property in question must be natural and unimproved government land. The legislative committee comment to section 831.2 states: "This section provides an absolute immunity from liability for injuries resulting from a natural condition of any unimproved public property. Thus, for example, under this section and section 831.4, the State has an absolute immunity from liability for injuries resulting from natural conditions of a state park area where the only improvements are recreational access roads...and hiking, riding, fishing and hunting trails...It is desirable to permit the members of the public to use public

property in its natural condition and to provide trails for hikers and riders and roads for campers into the primitive regions of the State. But the burden and expense of putting such property in safe condition and the expense of defending claims for injuries would probably cause many public entities to close such areas to public use. In view of the limited funds available for the acquisition and improvement of property for recreational purposes, it is not unreasonable to expect persons who voluntarily use unimproved public property in its natural condition to assume the risk of injuries arising therefrom as a part of the price to be paid for benefits received."

III. Immunity and the Fence

Plaintiff argues the state's voluntary construction of the fence along the bluffs imposed a duty upon the state

to maintain the fence. The State's failure to maintain the fence, plaintiff contends, abrogates the immunity afforded by section 831.2.

The trial court, in granting summary judgment, found "the State could have assumed a duty by construction and maintenance of the fence." The court found under the holding of McCauley, supra, 190 Cal App 3d 981, for the state to have assumed such a duty plaintiff must have relied on the fence. Plaintiff argues the court erred in requiring reliance on plaintiff's part.

We begin our analysis with a consideration of McCauley, and an earlier case, Gonzales v. City of San diego (1982) 130 Cal App 3d 882, which the court in McCauley discussed at length.

In McCauley, a 21-year-old plaintiff drank alcohol with friends on the cliffs

above a beach in San Diego. Plaintiff stumbled away in the dark and fell off the cliff onto the beach below. (Id. at p. 984.) The defendant City of San Diego had erected signs along the cliffs warning of hazardous cliffs, slippery trails and dangerous false trails. The city also placed a nine foot chain across the beginning of the trail. (Id. at p. 988, fn. 6; p. 985, fn. 2.)

Plaintiff argued the City's signs warning of false and slippery trails constituted an ineffective attempt to warn the public of the dangerous nature of the cliffs, which were eroding. Thus, by attempting to provide such warnings, plaintiff argued the City should be held liable for its negligence in failing to warn properly notwithstanding section 831.2 (Id. at p. 988.)

In considering plaintiff's argument,

the court considered the holding in Gonzales v. City of San Diego, supra, 130 Cal App 3d 882. In Gonzales a woman drowned while swimming at a beach that was voluntarily provided with lifeguard services by the city. The woman's children filed suit alleging the city negligently failed to warn swimmers of a dangerous riptide. The complaint alleged: "Although City knew or in the exercise of due care, should have known of the dangerous riptide, it created a dangerous condition by negligently failing to post any warning, by not marking the bench and surf areas as unsafe for public swimming, and by not adequately patrolling the area or having sufficient lifeguard or police service present at the time of the accident. These omissions created a reasonable expectation of safety for potential swimmers." (Id. at p. 885.)

The trial court sustained the city's demurrer without leave to amend, based on section 831.2. (Id. at pp. 884-885.)

The Court of Appeal in Gonzales reversed, finding section 831.2 inapplicable. The court found the condition of the beach was not a natural condition protected by section 831.2: "...the complaint describes a hybrid dangerous condition, partially natural and partly artificial in character, the result of a combination of a natural defect within the property and the third party conduct of the City. Thus, the dangerous condition arose from the existence of a natural dangerous riptide condition, plus City's voluntarily providing lifeguard service at Black's Beach (a duty with which it impliedly was not burdened under § 831.2), and its performing that voluntarily assumed service negligently by

failing to warn of the known, hazardous, natural condition." (Id. at pp. 885-886.)

The Gonzales court rejected the city's argument that to be held liable under the facts in Gonzales would render section 831.2 meaningless, since it would obligate the city to make the Pacific Ocean safe for public use, or compel it to close beaches and withdraw all voluntary lifeguard services. (Id. at p. 886.) The court found: "In essence, it [section 831.2] provides primary insulation from liability, freeing the public entity of the duty of providing any public service. However, once the public entity provides the protective service so as to create a dangerous condition, by combining a known natural defect within the property and the negligent performance of its directly related, voluntarily assumed protective service, the underlying intent, of the

provision of freeing the public entity form the duty of performing protective services, becomes moot." (Id. at pp. 886-887.)

The plaintiff in McCauley cited Gonzales and claimed the city assumed the responsibility for risk management on the cliffs by posting warning signs, signs which were insufficient to warn or protect the public from the dangerous condition of the eroding cliffs. The Court of Appeal disagreed, and distinguished the facts of Gonzales: "The protective service voluntarily assumed by the city in Gonzales were active and ongoing and of the character to induce reasonable public reliance. In comparison here, the passive nature of a series of warning signs is designed simply to warn the people to take care of they assume the risk in using the unimproved public

property in its natural condition. In Gonzales, once the City voluntarily assumed the duty of providing lifeguard services, it induced public reliance upon the expertise of those who provided the lifeguard service in detecting and warning of the existence of dangerous rip currents, latent in character to the majority of the unknowing, swimming public. However, here are not hidden dangerous conditions, but rather an undisguised cliff openly dangerous to all. Granted, McCauley can argue the condition became hidden and latent in the fog and darkness of the evening in question. However, where the City cannot be held liable for failing to post warnings on the specific, unimproved realty (see infra), we cannot imagine how the City would waive its right to immunity at night when its signage is not visible. Indeed, Gonzales

only stands for the proposition section 831.2 will not cloak a public entity with immunity when its own conduct is partially responsible for inducing a person to be victimized by a dangerous condition of the nature of a hidden trap." (McCauley, supra, 190 Cal App 3d at pp. 998-989, emphasis in original, fn. omitted.)[4]

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[4] In a footnote, the McCauley court further discussed the concept of a "hidden trap": "We note that section 831.2, as originally proposed by the California Law Revision committee, limited the breadth of this immunity by subjecting a public entity to liability for injury proximately caused by a dangerous condition which would not be reasonably apparent to and anticipated by an individual using the property with due care and the public entity or its employee had actual knowledge of the condition measures against the dangerous condition. (4 Cal law Revision Com. Rep. (1963) p. 852.) As evident from the language of enacted section 831.2, this exception was expressly rejected. consequently, the Commission would have permitted liability if natural conditions on unimproved property amounted to a hidden trap known to the public entity. However, by rejecting that qualification, the Legislature was not declaring that a

The court in McCauley further distinguished Gonzales by noting the plaintiffs in Gonzales adequately alleged public reliance on the city's voluntarily assumed protective service: the lifeguards. The McCauley court noted: "The role of reliance within Gonzales is significant, for absent reliance the City's conduct would not have been an allegedly independent, contributing and concurring cause of the decedent's drowning. Consequently, unlike Gonzales where reliance had been adequately alleged

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governmental entity would be cloaked with the immunity set forth in section 831.2 where it voluntarily assumes a protective service inducing public reliance and through the negligent performance of that protective service concurrently causes a member of the public to be victimized by a dangerous, latent, and natural condition, as in Gonzales. Rather, where a public entity's conduct actively increases the degree of dangerousness of a natural condition, the section 831.2 immunity is not available." (Id., at p. 989, fn 7, emphasis added.)

to survive a demurrer, the trial court here found after trail there was no evidence of reliance by McCauley on any actions of the city or that he was misled in any manner by the City's conduct." (Id. at pp. 989-990.)

Finally, the McCauley court found the policy provisions underlying section 831.2 supported its finding that the posting of warning signs did not preclude immunity. The court reasoned public safety is promoted by posting warning signs "so long as the public entity's conduct dies not amount to negligence in creating or exacerbating the degree of danger normally associated with a natural condition." (Id. at p. 990.)[5]

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[5] According to a later decision McCauley "does not overtly repudiate Gonzales, but it greatly limits its potential significance." (City of Santa Cruz v. Superior Court (1988) 198 Cal App 3d 999, 1005.) Another court has stated:

In the present case, plaintiff walked through a 100-foot gap in the fence the state erected along the bluffs. It was dark, and neither plaintiff nor her companions saw the fence. As the trial court noted, plaintiff did not rely on the fence; plaintiff did not even know the fence existed. Despite this lack of reliance, plaintiff argues the state's duty to nonnegligently maintain the fence prevents application of section 831.2.

We disagree. We find the present situation similar to the facts considered by the court in McCauley. As in McCauley, the public entity put into place safety features designed to warn the public of a dangerous natural condition. In both cases there was no reliance by the

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"Gonzales has been soundly rejected." (Tessier v. City of Newport Beach (1990) 219 Cal App 3d 310, 315.)

plaintiffs; the public entity's conduct did not induce plaintiffs to rely on the safety measures to their peril. Unlike the situation in Gonzales, where the lifeguard services lulled the victim into believing the dangerous condition to be safe, the plaintiffs in both the present case and McCauley were not misled as to the nature of the natural condition.

Several other courts have discussed the issue of reliance on the part of the plaintiff in determining whether section 831.2 immunity applies. In Rombalski v. City of Laguna Beach, supra, 213 Cal App 3d 842 the appellate court affirmed a summary judgment in a suit brought by a plaintiff who was injured diving from a rock at a public beach. Plaintiff had alleged the city's construction of a stairway, which allowed access to the beach, and the presence of a lifeguard

tower contributed to inducing him to dive into the ocean. (Id. at p. 852.) The appellate court disagreed concluding: "For Laguna to lose its absolute immunity not only must there be conduct on the part of the city but such conduct must have induced reliance by Byron [plaintiff]. No evidence or facts are present demonstrating conduct on the part of the city that actively increased the degree of dangerousness of the rock nor did its conduct in any manner induce Byron to dive into the ocean. Therefore, the absolute immunity of section 831.2 is available to the city as a matter of law." (Id. at p. 853, emphasis added.)

In another diving case, Morin v. county of Los Angeles (1989) 215 Cal App 3d 184, plaintiff argued the city, by posting a sign warning against diving, voluntarily assumed responsibility for

reasonable risk management for the entire beach area. (Id., at p. 193.) The court affirmed summary judgment in favor of the city finding the presence or absence of warning signs cannot abrogate the public entity immunity under section 831.2 for injuries resulting from use of unimproved public property. (Id. at p. 194.) The court stated: "In this case, the evidence before the court on the summary judgment motion...fails to support plaintiff's claim that the placement of the warning sign on the pier induced him to believe it was safe to swim and dive beyond the restricted area around the pier." (Id. at p. 193, emphasis added.)

In City of Santa Cruz v. Superior Court, supra, 198 Cal App 3d 999, plaintiff suffered injuries after diving and striking a submerged object, possibly a sandbar. Although lifeguards had been

instructed to prohibit persons from diving into the river, the lifeguard stationed in the area where plaintiff was injured was elsewhere when the accident occurred. The appellate court issued a peremptory writ of mandate directing the trial court to grant summary judgment in favor of the city. The court stated: "There is no testimony that lifeguards are now or ever have been placed so as to induce people to think it is safe to dive wherever there are no lifeguards. There is no evidence that anyone induced [the plaintiff] to dive into shallow water in an unimproved river, as he did, nor that he was misled by any City employee into believing the area was safe for diving," (Id. at pp. 1005-1066, citation omitted, emphasis added.)

In Mercer v. State of California (1987) 197 Cal app 3d 158, plaintiff,

injured while driving on sand dunes in a state park, argued the state had assumed the duty to warn by posting signs and providing ranger services. The court in Mercer disagreed, finding neither the posting of signs nor the lack of rangers removed section 831.2 immunity. The court also noted: "Furthermore, the critical evidence of appellant's reliance on the ranger services is absent. Appellant entered the park at night, apparently with the knowledge that the ranger station was unmanned. The role of reliance in Gonzales is crucial, for without it, the defendant city's conduct in that case would not have been an alleged cause of the decedent's death." (Id. at p. 158, citation omitted,)

The court in Mercer concluded: "Nothing in the record indicates respondent voluntarily assumed the

obligation to warn the public of the dangers of using off-road vehicles in the dunes recreation area, or otherwise by its conduct negligently increased the dangerousness of the dunes' natural condition. Nor has appellant offered any evidence that he was misled or given a false sense of security by respondent's conduct. Appellant's contention, that he was entitled as a user of the park to rely on a safe recreational area, is exactly the type of complaint section 931.2 was designed to protect public entities against." (Id. at p. 169, emphasis added.)

Recently in Valenzuela v. City of San Diego (1991) 234 Cal App 3d 258, a plaintiff injured diving from a rock at the beach argued the city was liable because it failed to warn beachgoers of dangerous shallow water. Warning signs

had been posted one-quarter mile from the scene of the accident. The court found the city immune noting: "The city never assumed an active role in risk management. It simply placed warning signs in an area where injuries had occurred. The mere placement of signs in a dangerous area does not reasonably induce the public to believe all other areas are safe. This is especially true where the danger is obvious, such as jumping off a rock into shallow water. Moreover, unlike the plaintiffs in Gonzales, Valenzuela does not even allege the warning signs a quarter of a mile south of his accident induced his decision to dive. There is no evidence to suggest he read these signs, much less relied upon them." (Id. at p. 262, citation omitted.)

We find the reasoning of McCauley sound and find the trial court correctly

analogize the present case to McCauley and found the broken fence, which plaintiff was unaware of, did not abrogate the immunity afforded by section 831.2.

A. Improved or Unimproved Property

Plaintiff also challenges the trial court's finding that the bluffs were unimproved property, a requirement for immunity under section 831.2. Plaintiff argues whether the fence and warning signs made the property in question "improved" is a question of fact which should not have been decided on a motion for summary judgment. Plaintiff also contends the court erred in finding the property "unimproved." The trial court stated: "I had made a finding here that based on the evidence before the Court the fence did not change the natural condition."

Whether or not property is improved can be determined as a matter of law. In

Mercer, supra, 197 Cal app 3d 158, the driver of an all-terrain vehicle was injured driving on sand dunes in a state recreation area. Plaintiff argued section 831.2 immunity did not apply because the state had substantially improved the park by posting signs warning of dangerous surf conditions, setting speed limits, warning of environmentally sensitive areas and be erecting fences.

The Court of Appeal in Mercer affirmed summary judgment in favor of the city holding: "We find, contrary to appellant's contention, that there is no triable issue of fact as to whether the vehicular recreation area of Pismo State Beach was in an improved condition at the time of the accident. [¶] Although the scope of section 831.2 is not made clear by its language, it appears that to qualify public property as improved, so as

to take it outside the natural condition." (Id. at pp. 164-165.)[6]

Several other courts have determined the question of unimproved or improved property on a motion for summary judgment: Rombalski, supra, 213 Cal App 3d at p. 852 (stairway and lifeguard tower did not make beach improved property); City of Santa

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[6] The court in Mercer found no evidence of any alteration in the natural condition of the dunes; no improvements had been made within or near the dunes area. (Id. at p. 159.) The court concluded: "The dunes were not therefore transformed into improved property. Further, there was no evidence even suggesting that these so-called improvements had any causal connection with appellant's accident. [¶] Additionally, the fences and signs protecting nonpublic property promoted the beneficial use of park lands and thereby contributed to the preservation and public enjoyment of natural resources. The speed limit and surf condition signs advanced the important state goal of protecting the public's safety. A ruling in favor of appellant on this issue would thus both defeat the purpose of section 831.2 and violate public policy." (Id. at pp. 165-166, citation omitted.)

Cruz, supra, 198 Cal app 3d at p. 1005-1006 (lifeguards and signs do not make beach improved); Tessier v. City of Newport Beach, supra, 219 Cal App 3d 310 (nearby dredging of harbor and resulting movement of sand did not make beach improved); Morin v. County of Los Angeles, supra, 215 Cal App 3d at pp. 188-189 (nearby pier, jetties and manmade underwater reef did not make beach improved).

Plaintiff relies on two cases in which the court determined the question of whether property was improved was a question of fact.[7] In Buchanan v. City of

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[7] Plaintiff also relies on Hernandez v. Imperial Irr. Dist. 91967) 248 Cal App 2d 625, in which the court reversed the summary judgment finding triable issues of fact. However, in Hernandez, defendant sought immunity under section 831.4 (no liability for condition of unpaved roads), and the trial court existed near the road. (Id. at p. 627.)

Newport Beach (1975) 50 Cal App 3d 221, the Court of Appeal reversed the granting of a nonsuit in favor of the city. Plaintiff, injured while body surfing, alleged nearby dredging had raised the beach level by 27 feet, causing a steep slope. As a result, a "plunging" type of wave resulting from a change in the natural conditions caused plaintiff's injury. The appellate court found: "The alteration of the flow of the ocean, the wave action and the slope of the beach caused unnatural conditions. Whether, as claimed by defendant, these conditions by time and tide have become natural is a question of fact." (Id. at p. 227.)

In Fuller v. State of California 91975) 51 Cal app 3d 926, plaintiff, injured in a dive from a cliff in a state park, brought suit against the state. The construction of a nearby yacht harbor and

jetty caused a buildup of sand on the beach, and had decreased the depth of the water. Prior to the accident, the state erected portable lifeguard towers, restroom facilities and concrete fire rings. In addition, there were well-defined paths and steps on the cliffs. Lifeguards had been instructed to warn people on the cliffs that diving was hazardous, and occasionally lifeguards were stationed on the cliffs. Warning signs discouraging diving had previously been placed on the cliffs, but were absent at the time of the accident. (Id. at p. 936.)

On these facts, the trail court instructed the jury on immunity under section 831.2, leaving it to the jury to determine whether the property was unimproved public property. (Id. at p. 936.) The jury found the property was

unimproved public property, and found the state immune under section 831.2. On appeal, plaintiff argued the trial court erred in not ruling, as a matter of law that the property was improved, The Court of Appeal disagreed stating: "Section 831.2 presents two fact questions, whether the property there was 'unimproved' public property." (Id. at p. 937.)

In the present case, both parties agree on exactly what additions or changes have been made by the sate: the placement of warning signs at various locations, and the erection of the fence. Unlike the situation in Buchanan, we are not faced with "conditions of time and tide" capable of changing the condition of the property. Nor does the present situation present a lengthy, complicated series of changes such as those encountered by the court in Fuller.

The trial court correctly found, as a matter of law, the fence and signs did not make the bluffs "improved property." The changes did not increase the dangerousness of the cliffs, nor did the change induce plaintiff's reliance. As the court in Rombalski, supra, 213 Cal App 3d 853, which considered a stairway allowing beach access and lifeguard towers, stated: "No evidence or facts are present demonstrating conduct on the part of the city that actively increased the degree of dangerousness of the rock [from which plaintiff dove] not did its conduct in any manner induce Byron [plaintiff] to dive into the ocean. Therefore, the absolute immunity of section 831.2 is available to the city as a matter of law.[8]

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[8] Since we find the trial court correctly found the state immune under section 831.2, we do not address plaintiff's argument regarding immunity

IV. Dangerous Condition

In a brief footnote, plaintiff contends a question of fact exists as to whether the area where the accident occurred was a dangerous condition invoking liability under Government Code section 835. Section 835 states: "Except as provided by statute, a pubic entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful

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under section 831.4 (immunity for unpaved roads providing access to fishing, hunting or recreation areas).

act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or[¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Emphasis added.)

Dangerous condition is defined as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable it will be used." (Gov. Code, § 830.)

However, Government Code section 815, subdivision (b) states: "The liability of a public entity established by this part (commencing with Section 814) is subject

to any immunity of the public entity if it were a private person." Under subdivision (b) of section 815, the immunity provisions of the California Tort Claims Act will generally prevail over any liabilities established by statute. (Cochran v. Herzog Engraving Co. (1984) 155 Cal app 3d 405, 409; O'Hagan v. board of Zoning Adjustment (1974) 38 Cal App 3d 722, 728.)

In the present case, we find the state immune under Government Code section 831.2, therefore, we also find the state immune from liability under Government Code section 835. (See: Winterburn v. City of Pomona (1986) 186 Cal App 3d 878, 882; Geffen v. County of Los Angeles 91987) 197 Cal App 3d 188, 191-192; Rombalski, supra, 213 Cal App 3d at p. 863, conc. opn. of Crosby, Acting P.J.)

DISPOSITION

The judgment is affirmed. The state shall recover costs on appeal

RAYE, J.

We concur:

PUGLIA, P.J.

DAVIS, J.

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IN THE SUPERIOR OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

BRENDA RABBITT, etc., Plaintiff, v. STATE OF CALIFORNIA, Defendant.	No. 341615 JUDGMENT ON MOTION FOR SUMMARY JUDGMENT Date Heard: June 26, 1990 JUDGE RONALD B. ROBIE

Defendant's motion for summary judgment came regularly for hearing on June 26, 1990 in Department 27 of the above-entitle court, the Honorable Ronald

B. Robie presiding. Plaintiff having objected to the court's proposed ruling, appearances were made on behalf of both plaintiff and defendant. Plaintiff appeared by and through her attorneys of record Wilcoxen, Callahan, Montgomery and Harbison by Daniel E. Wilcoxen. Defendant appeared by and through its attorney of record, John K. Van de Kamp, by James M Schiavenza, Deputy Attorney General. Evidence having been presented by both parties in conformance with Code of Civil Procedure section 437c, the cause having been briefed, argued and submitted for decision, and good cause appearing,

IT IS ORDERED, ADJUDGED AND DECREED that defendant's motion of summary judgment is granted. Plaintiff shall take nothing by reason of her complaint on file herein. Defendant shall recover costs in the amount of $6,137.47.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the motion of plaintiff for summary judgment on the issue of liability and/or summary adjudication of issues is denied as moot.

Dated: July 2, 1990

Ronald B. Robie
RONALD B. ROBIE
Judge of the Superior Court

ATTEST:
JOYCE E. RUSSELL, CLERK
BY P. ALLEN
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

DATE & TIME:		06-26-90 9:00 a.m.
DEPT: NO.	:	27
JUDGE	:	RONALD B. ROBIE
CLERK	:	P. ALLEN
REPORTER	:	ELEC. CHERYL HAWELL
BAILIFF	:	R. SALVATIERRA

COUNSEL:

BRENDA RABBIT, etc. Daniel E. Wilcoxen

VS. 34165

STATE OF CALIFORNIA, et.al.
James M. Schiavenza

NATURE OF PROCEEDINGS:
MOT FOR SUMM JUDG ON THE ISSUE OF LIABILITY &/OR FOR SUMM ADJUDIC OF ISSUES, MOT FOR SUMM JUDG OR ALTERNATIVELY SUMM ADJUDIC. etc.

X This matter argued by counsel and submitted.

Tentative Ruling:

Motion of State: Granted.

The condition is natural. The fence did not change this. The state could have assumed a duty by construction and maintenance of the fence. However, under McCauley v. City of San Diego (1987) 1990 Cal App 3d 981, 985, for the State of

have assumed such a duty, then plaintiff must have seen and relied on the fence in order to hold the State liable.

Rombalski v. City of Laguna Beach (1989) 213 Cal App 3d 842, 853, it is undisputed that the plaintiff did neither.

Motion of Plaintiff: Denied as moot.

After hearing oral arguments, the Court affirmed its tentative ruling.

BOOK: 27
PAGE: 315
DATE: 06-26-90
CASE NO: 341615
CASE TITLE: BRENDA RABBIT, etc.
DISTRIB:

JOYCE E. RUSSELL, COUNTY CLERK-RECORDER

By: P. Allen Deputy